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Supreme Court, U.S.
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No. 96-651

In The

Supreme Court of the United States

October Term, 1996

JAMES E. GILBERT, ET AL.,

Petitioners,

vs.

RICHARD J. HOMAR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT, RICHARD J. HOMAR

JAMES V. FARERI, Esq.*
JENNIFER HARLACHER SIBUM, Esq.
NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI, P.C.

712 Monroe Street
Stroudsburg, PA 18360
(717) 421-9090

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the due process clause requires a tenured public employee to be afforded notice and an opportunity to be heard prior to being indefinitely suspended, without pay, solely on the basis of such employee's warrantless arrest?

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STATEMENT OF THE CASE

1. Respondent, Richard J. Homar (hereinafter "Homar"), was hired as a Police Officer I at East Stroudsburg University (hereinafter "ESU") on February 10, 1992.[1] The position of Police Officer I is subject to a collective bargaining agreement between the Commonwealth of Pennsylvania as employer and the International Union, United Plan Card Workers of America, as bargaining agent. J.A. 6a. Homar successfully completed a six-month probationary period, and therefore became fully tenured in his position in accordance with terms of the collective bargaining agreement. J.A. 5a; Pet. App. 58a-59a.

On the morning of August 26, 1992, Homar was present at the home of an acquaintance, James Crompton, who lived near by Homar's mother, when the Pennsylvania State Police executed a search warrant on the Crompton premises.[2] J.A. 6a, 50a-51a. Homar was not on duty at the time the search warrant was executed. After execution of the search warrant, Homar was arrested by the State Police and charged with possession of marijuana, possession with intent to deliver marijuana and criminal conspiracy. Pet.App. 3a.

The arrest was made incident to the search. The Pennsylvania State Police did not have an arrest warrant

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[1] Homar was previously employed by ESU for a period of approximately four years as a Groundskeeper, the position to which he was subsequently demoted. J.A. 5a.

[2] The State Police initially told Levanowitz that Homar "may have been at the wrong place at the wrong time." J.A. 70a.

for Homar at the time the arrest was made and had no reason to suspect that Homar was even at the premises.

After consultation with Respondent's immediate supervisor, Chief David Maravas, the Director of Human Resources at ESU, Gerald Levanowitz, determined to suspend Homar without pay. J.A.70a-71a, 79a. Homar was notified by personal delivery of a letter of suspension signed by Levanowitz dated August 27, 1992. J.A. 27a. The suspension without pay was effective immediately and was for an indefinite period of time.[3] J.A. 27a, 37a.

On September 1, 1992 all criminal charges lodged against Homar were dismissed for insufficient evidence after a preliminary hearing.[4] J.A. 7a. The charges were never refiled although the Pennsylvania State Police had

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[3] The letter specifically indicated " . . . that any administrative action that may be taken by the University as a result of criminal charges filed against you do not have to coincide with a disposition of those charges through the legal process". J.A. 57a.

[4] Under Pennsylvania Criminal Practice, a criminal defendant is entitled to a preliminary hearing after arrest at which the Commonwealth must demonstrate a *prima facie* case. PA Rules of Criminal Procedure, 141(d); 143(a). If a *prima facie* case is not established, the defendant must be discharged. *Id.* In order to establish a *prima facie* case, the Commonwealth must merely demonstrate that a crime was committed and the accused is probably the individual who committed it. *Commonwealth v. Wojdak*, 466 A.2d 991 (Pa. 1983). The evidence must be such that "if presented at the trial in Court, *and accepted as true*, the judge would be warranted in allowing the case to go to the jury". *Id.* at 996 (emphasis in original).

that option.[5] J.A. 7a, 27a. Levanowitz did not lift the suspension after dismissal of all the charges, and continued with his own independent investigation. J.A. 75a, 76a.

On September 11, 1992, Levanowitz met with arresting Pennsylvania State Police troopers in order to obtain information pertaining to Homar. J.A. 27a, 79a. At this meeting, Levanowitz was given a copy of a page out of the Pennsylvania State Police investigative file regarding the Homar arrest entitled "Supplemental Report." The "Supplemental Report" contained statements that Homar allegedly made to the Pennsylvania State Police during an interview of Homar at the State Police barracks on August 26, 1992 after Homar's arrest. *Id.* The statements contained alleged admissions of Homar that he was aware of marijuana dealing by Crompton and another individual, and that he received marijuana from such other individual for his own use. Pet. App. 4a. Homar denied making such statements attributed to him by the state Police in the report; he specifically denied that he was aware of marijuana dealing and that he had obtained marijuana from the other individuals arrested. J.A. 51a.

Levanowitz set up a meeting with Homar on September 18, 1992. J.A. 28a. At the meeting, which was called

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[5] An accused may be rearrested and prosecuted despite the dismissal of charges at a preliminary hearing. *Commonwealth v. Genovese*, 425 A.2d 367, 369, n.7 (Pa. 1981). "A finding by a committing magistrate that the Commonwealth has failed to establish a *prima facie* case is not a final determination, such as an acquittal, and only entitles the accused to his liberty for the present, leaving him subject to rearrest". *Commonwealth v. Hetherington*, 331 A.2d 205, 208 (Pa. 1975).

by Levanowitz, Levanowitz explained to Homar that he had received evidence "very serious in nature" from the Pennsylvania State Police and that he wanted Homar to tell "his side of the story". Levanowitz did not disclose to Homar that he had received the "Supplemental Report" which contained admissions to wrongful conduct allegedly made by Homar. Homar was not given a copy of the "Supplemental Report" at the meeting or prior thereto, and was not otherwise advised by Levanowitz what the "very serious" evidence was. J.A. 77a.

On September 23, 1992, Levanowitz issued a second letter to Homar advising Homar that he was being demoted from the position of Police Officer I to the position of groundskeeper, effective retroactive to August 26, 1992. The letter advised that the basis of the demotion was not Homar's arrest, but rather the "admissions made by yourself to the State Police." The letter further provided that Homar would receive back pay at the rate of pay for groundskeeper during the period of his suspension, i.e. August 26, 1992 through September 24, 1992. J.A. 82a.

After the letter demoting Homar was issued, Homar, through his union representative, contacted the President of ESU, James Gilbert, to request a meeting to discuss his demotion. J.A. 35a, 36a. The meeting occurred at the offices of President Gilbert on September 24, 1992 and was attended by Homar, his union representatives and

Levanowitz. President Gilbert issued a letter on September 24, 1992 upholding the demotion. J.A. 8a-9a.[6]

After his demotion, Homar received back pay for the period of his suspension, i.e. August 26, 1992 through September 24, 1992 at the groundskeeper rate of pay. Thereafter, on February 16, 1993, ESU paid to Homar the difference between the Groundskeeper rate and the Police Officer I rate for the period of his suspension. J.A. 53a; Pet. App. 6a, N1.

2. Homar thereafter filed a civil action in the United States District Court for the Middle District of Pennsylvania on June 7, 1993. J.A. la. The complaint named four officials at ESU, including Gilbert and Levanowitz, as Defendants and sought relief for violation of Homar's procedural due process and substantive due process rights by merit of his suspension and subsequent demotion. J.A. 3a-15a. After completion of discovery, Defendants filed a Motion for Summary Judgment which was granted by the District Court in an Opinion and Order dated March 7, 1995.

As a preliminary matter, the Court noted that there was no dispute that Homar had a protected property interest in his job. Pet. App. 58a. In weighing the competing interests involved, the District Court found that although the private interest of Homar was strong, the deprivation incidental to Homar's suspension "was only

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[6] The "Statement of James Gilbert" found in the Joint Appendix incorrectly sets forth the date of the meeting as September 4, 1992. J.A. 36a. This apparently is a printing error, as the statement filed with District Court contains the correct date of September 24, 1992.

temporary and of a relatively brief duration of approximately one month." Pet. App. 60a. The Court found that because it was "undisputed" that Homar had been arrested, there was a substantial assurance that the deprivation was not baseless or unwarranted. *Id.* The District Court also found that the deprivation at issue was "de minimis" as Homar was subsequently awarded full pay and benefits for the period of suspension. Pet. App. 62a-63a.

On appeal, in a 2-1 decision, the Third Circuit reversed. It observed that this Court has made it "eminently clear" that due process entitles a party to a hearing " 'before he [or she] is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " Pet. App. 8a (*quoting Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)). Quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-546 (1985), the Court further noted that "[s]uch a hearing need not be elaborate, but rather 'an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' " *Id.*

The Court of Appeals agreed that Homar's arrest gave the University a compelling justification for summarily relieving him of his duties. Pet. App. 11a. Applying the interest balancing analysis of this Court's due process decisions, however, it ultimately concluded that due process was violated because there had been no justification offered for summarily imposing a suspension without pay. *Id.*

As the Court of Appeals explained, this Court " 'has frequently recognized the severity of depriving a person of means of livelihood.' " Pet. App. 11a (*quoting Loudermill*, 470 U.S. at 543). Further, the Court of Appeals observed, while *Loudermill* had recognized that "there were some limited instances in which a strong governmental interest might warrant immediately removing a person from a position without a hearing," the Court had also advised that "in those situations," the employer "can avoid the problem by suspending with pay." *Id.* (*quoting Loudermill*, 470 U.S. at 544-45). The Court of Appeals noted that there had been no explanation offered for "why, in order to maintain public confidence in the police department and to protect public safety, it is necessary that ESU not only suspend Homar from acting as a police officer, but also deprive him of his salary." Pet. App. 14a-15a, n.5.

The Court of Appeals observed that its holding was "not only consistent with, and suggested by *Loudermill*," but also "eminently sensible." Pet. App. 14a. The Court of Appeals recognized that "it is imperative that employers be provided with adequate flexibility to allow them to protect the public and respond to emergency situations expediently." *Id.* It held, however, that "suspension with pay addresses these important concerns while simultaneously protecting the fundamental rights of an employee to due process prior to being deprived of his or her property interest in employment and its accompanying salary." *Id.*

SUMMARY OF ARGUMENT

It is unnecessary for this Court to reach the propriety of the blanket rule crafted by the Court of Appeals, as the decision below may be affirmed after application of the traditional due process factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Notice and an opportunity to be heard prior to a deprivation of any significant property interest is the "root requirement" of due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 503-504 (1985) (citations omitted). Pre-deprivation notice and an opportunity to be heard have been described as the "general rule" of due process by this Court. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 501 (1993).

The quantum of due process to be afforded under a particular set of circumstances is determined by applying the traditional due process factors set forth in *Mathews*, 242 U.S. at 335. A straightforward application of the *Mathews* factors to the facts of this case reveals no reason to depart from the "general rule" of due process that notice and an opportunity to be heard should be provided before the deprivation.

Mathews requires consideration of three distinct factors:

1. The private interest that will be affected by the official action;

2. The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of any additional or substitute procedural safeguards; and

3. The government's interest including the function involved and the fiscal and administrative burdens that any additional or substitute procedural requirements would entail. *Mathews*, 424 U.S. at 335.

Homar had a strong interest in maintaining his employment and means of livelihood. The Court has frequently recognized the severity of depriving someone of their means of livelihood. *Loudermill*, 470 U.S. at 343. Because Homar's suspension was for an indefinite period of time, Homar had an even stronger interest that was affected by the official action. Because the period of suspension was open-ended, it should have been viewed for all practical intents and purposes as a termination.

Because Homar's arrest was not the process of a lengthy police investigation, a grand jury indictment or even an arrest warrant, there was "risk of an erroneous deprivation" which would have been cured by a pre-deprivation notice and opportunity to be heard. There is great utility in a pre-deprivation opportunity to be heard, as Homar would have had the opportunity to profess his innocence and request that his suspension be with pay.

This Court is in no manner bound by Petitioners' heavy reliance upon the Governor's Code of Conduct which purports to require suspension without pay after a felony arrest. That code, which merely is an executive order of the governor, has not been previously relied upon by Petitioners in these proceedings, and has no force of law. Levanowitz himself testified that he was not obliged to follow such code in determining whether to suspend Homar.

Although the governmental interest in law enforcement integrity and public safety are important, they would not be undermined by a rule recognizing that Homar should have received a *Loudermill*-type hearing before he could be suspended without pay. Nor would petitioners have suffered any significant burden by affording Homar at least the same due process as was afforded a high school student facing a ten-day suspension in *Goss v. Lopez*, 419 U.S. 565 (1975), that being notice of the charges against him, an explanation of the evidence and an opportunity to present his side of the story.

Petitioners' heavy reliance on *Barry v. Barchi*, 448 U.S. 55 (1979) and *FDIC v. Mallen*, 486 U.S. 230 (1988) to overcome the "general rule" that a pre-deprivation notice and opportunity to be heard should have been provided, is misplaced. Neither case provides a basis for an exception to the "general rule" as applied to the facts of this case.

ARGUMENT

I. EXCEPT IN EXTRAORDINARY CIRCUMSTANCES, DUE PROCESS REQUIRES AN OPPORTUNITY TO BE HEARD PRIOR TO DEPRIVATION OF A PROTECTED INTEREST.

The "root requirement" of the due process clause requires that an individual be given an opportunity to be heard before he or she is deprived of any significant property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543-544 (1985), *citing Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). In *Loudermill*, the Court

specifically acknowledged that "the only meaningfully opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." 470 U.S. at 543. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Deprivation of a property interest without a prior opportunity to be heard is the rare exception, not the rule. "This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth amendments." *Fuentes*, 407 U.S. at 82.

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. at 378-379 (emphasis in original).

In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993), the Court recently reaffirmed the "general rule" that individuals must receive notice and an opportunity to be heard before the government deprives them of property. "We tolerate some exceptions to the general rule requiring the pre-deprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " 114 S. Ct. at 501.

II. RESPONDENT SHOULD HAVE BEEN AFFORDED A PRE-DEPRIVATION OPPORTUNITY TO BE HEARD UNDER TRADITIONAL DUE PROCESS ANALYSIS.

In ascertaining the due process to be afforded a tenured public employee whom the employer desires to suspend *without pay*, the Court of Appeals for the Third Circuit below crafted a rule requiring the governmental employer to provide the employee with "some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard". Pet. App. 14a. The Court further held that in the event the governmental employer desired to suspend the employee without providing a pre-deprivation opportunity to be heard, then such suspension must be with pay. *Id.*

Although respondent believes the holding of the Court of Appeals to be essentially correct, this Court need not reach the issue of whether the Court below properly fashioned what Petitioners characterize as a "blanket rule." It is submitted that the holding of the court of appeals below may be affirmed after straightforward application of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), to the facts at bar. Moreover, as argued at length by *amicus curiae* National Treasury Employees Union, this Court should confirm that, as a general rule, public employees are entitled to a limited pre-deprivation hearing before they may be suspended without pay.

Respondent agrees with Petitioners that in order to ascertain the quantum of due process that must be afforded in a given situation, the factors set forth in

Mathews should be applied. See Pet. Br. 12-13. The requisite due process required under a particular set of facts and circumstances is determined by a balancing of the governmental and private interests that are affected. *Mathews v. Eldridge*, 424 U.S. at 334; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

Identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interests that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any or additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. at 335 (citation omitted).

A. Homar Had A Strong Private Interest In Maintaining His Tenured Position And Wages.

Homar had a strong private interest in maintaining his continued employment and means of livelihood. An interest "in continued employment is without doubt an important interest that ought not to be interrupted without substantial justification". *FDIC v. Mallen*, 486 U.S. 230, 243 (1988).

> The significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere,

> doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Loudermill, 470 U.S. at 543. (citations omitted)

In the case at bar, Homar's suspension without pay was open-ended. The letter notifying Homar of his summary suspension specifically indicated that any "administrative action" to be taken by the University did not have to coincide with the disposition of the criminal charges against Homar. J.A. 82a. The period of the suspension could, therefore, continue indefinitely.[7]

Where an employee is being suspended for an indefinite period of time, it is submitted that the employee has an even stronger private interest that will be affected by the official action.

Petitioners denigrate Homar's property loss by describing it as mere "money" which is "easily replaceable". Pet. Br. 19. It is respectfully submitted that loss of income from one's employment is not mere money, but rather goes directly to the ability to support one's self and provide for one's basic needs. The Court has previously recognized that loss of even part of a wage earner's salary "often means his family will go without the essentials." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 n.9 (1975).

The loss of a wage earner's paycheck is certainly at least as important as the loss of an income stream from

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[7] Homar's suspension, in fact, continued 23 days beyond September 1, 1992, the date that all criminal charges filed against him were dismissed.

real property, which the Court recently held to be a significant private interest in *United States v. James Daniel Good Real Property, supra,* wherein the Court stated:

> The government makes much of the fact that Good was renting his home to tenants, and contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection. The rent represents a significant portion of the exploitable economic value of Good's home. It cannot be classified as *de minimis* for purposes of procedural due process. In sum, the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance.

114 S. Ct. at 501.

The loss of salary for an indefinite period of time is also at least as important as a fixed ten-day suspension from high school, which the Court specifically found "not de minimis in our view." *Goss v. Lopez,* 419 U.S. 565, 576 (1975). "The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause." *Id.* (citations omitted).

Where the suspension is for an indefinite period of time, as the case here, it is respectfully submitted that the suspension must be viewed or all practical intents and purposes as a termination. A wage earner who is suspended for an open-ended period of time does not have the luxury of sitting idle in the hopeful expectation of the employer lifting the suspension at some indefinite time in

the future. There is no guarantee of the suspension ever being lifted. It must be expected that the suspended wage earner will be confronted with an immediate lack of funds, and a need to expeditiously replace those funds with other employment during the tenure of the open-ended period of suspension. Therefore, in addition to the income loss itself, the wage earner is confronted with finding employment elsewhere under the stigma of the suspension and being "burdened by the questionable circumstances under which he left his previous job." *Loudermill*, 470 U.S. at 543.

Based on the foregoing, it is submitted that, under these circumstances, there is a strong private interest to be given great weight in a *Mathews* due process analysis.

B. There Was A Substantial Risk Of An Erroneous Deprivation Of Homar's Property Interest That "Additional Or Substitute Procedural Safeguards" May Have Prevented.

Petitioners characterize the second factor to be examined in a due process analysis as "the value of additional or substitute procedural safeguards." Pet. Br. 20. This is an oversimplification of the second *Mathews* factor. The second factor to be analyzed in due process balancing analysis is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. at 335. In the case at bar, it is submitted that there was a substantial risk of erroneous deprivation.

1. Homar was arrested incident to a search of a friend's home that he happened to be visiting at the time the search warrant was executed. The arrest of Homar was not the process of a lengthy police investigation, grand jury indictment, or even an arrest warrant; rather, it spontaneously occurred because he was at the proverbial "wrong place at the wrong time".

Because Homar's arrest was incident to the execution of a search warrant of another's premises, there is no adequate assurance that the deprivation was not erroneous. The circumstances here stand in marked contrast to, for example, those present in *Mallen*, where an independent body – a grand jury – determined that there was probable cause to believe that a crime had been committed. *Mallen*, 486 U.S. at 244. As in *United States v. James Daniel Good Real Property*, there is an "unacceptable risk of error" that argues strongly in favor of some opportunity to be heard prior to the deprivation. 114 S. Ct. at 501.

Petitioners argue that "little useful purpose" would be served by any pre-deprivation opportunity to be heard, as the only issue to be determined by Levanowitz was whether or not Homar had been arrested and charged with a felony. Pet. Br. 20-21. However, it is submitted that there would be great purpose and utility in giving Homar the benefit of informing Levanowitz of the circumstances under which he was arrested. Had a pre-deprivation opportunity to be heard have been provided, Homar could have advised Levanowitz that he was arrested as a result of visiting the Crompton house that morning, which he had only entered minutes prior to the execution of the search warrant by the Pennsylvania State

Police. J.A. 50a-51a. He could have advised Levanowitz that he was on his way to do yard work at his mother's home, which was a block down the road from the Crompton house, on the morning of his arrest. *Id.* He could have personally professed his innocence and given Levanowitz some basis upon which to make his decision, other than information obtained solely from the arresting officers.

Additionally, "[e]ven where the facts are clear, the appropriateness or necessity of a discharge may not be . . . " *Loudermill*, 470 U.S. at 543. In addition to professing his innocence and simply being at the wrong place at the wrong time, Homar could have also requested Levanowitz to suspend him with pay at a pre-deprivation opportunity to be heard, or request that his duties be adjusted as a result of his arrest. In sum, a very useful purpose would have been served by allowing Homar to state his case before Levanowitz prior to Levanowitz's decision with respect to Homar's suspension.

2. Petitioners argue that Levanowitz had no choice but to suspend Homar without pay because Levanowitz was allegedly bound by applicable administrative regulation that mandated suspension without pay in cases where an employee had been formally charged with a felony. Pet. Br. 20-21. The regulations at issue are found in what is commonly referred to as "The Governor's Code of Conduct" codified at 4 Pa. Code §7.172, 7.173 (reproduced in part at Pet. Br. 3).

As a preliminary matter, Petitioners have come late to the argument that the action of Levanowitz in suspending Homar without pay was mandated by the above referenced provisions of the Governor's Code of Conduct. The above regulations have not been raised or even referred to previously by Petitioners in Petitioners' Answer to the Complaint (J.A. 17a-23a); Petitioners' Motion, Statement of Material Facts, or Brief filed in Support of Petitioners' Motion for Summary Judgment filed in the District Court; Petitioners' Brief in the Court of Appeals below, or the Petition for Certiorari. It is therefore submitted that Petitioners' new-found argument that Levanowitz was bound by the above referenced regulations are subject to the doctrine of waiver and should not even be considered by this Court.[8]

Additionally, under Pennsylvania law, the Governor's Code of Conduct does not have the force of law. The Governor's Code of Conduct is not a statute, but rather is merely an executive order issued by the governor. *State Correctional Institution at Greaterford v. Brumfield*, 594 A.2d, 852, 856 (Pa. Commw. Ct. 1991). "In no event . . . may any executive order be contrary to any constitutional or statutory provision, nor may it reverse, countermand, interfere with, or be contrary to any final decision or order of any court. The Governor's power is to execute the laws and not to create or interpret them." *Aiello v. Department of Environmental Resources*, 551 A.2d 664, 665

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[8] See *Auer v. Robbins*, 65 U.S.L.W. 4136, 4139 (February 19, 1997) citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider arguments not adequately preserved below).

(Pa. Commw. Ct. 1988), *citing Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Commw. Ct. 1975).

An order of the governor which communicates requested or suggested directions for the execution of the duties of the executive branch of government are mere directives which do not confer a legally enforceable right. *Sever v. Commonwealth of Pennsylvania Department of Environmental Resources*, 514 A.2d 656, 659 (Pa. Commw. Ct. 1986). A directive which implements an executive order has no force of law. *Id.* Therefore, Petitioners' argument that "state law *required* that any employee be suspended without pay as soon as practicable" after being charged with a felony (Pet. Br. 21) is without merit.

Levanowitz himself indicated that he did not believe the Governor's Code of Conduct to clearly require him to suspend Homar. When asked if he was "obliged" to follow the Governor's Code of Conduct, Levanowitz stated "I'm not sure that I would choose the word 'obliged' "; rather, he testified that "I did refer to [the Governor's Code of Conduct] and let it guide my actions somewhat in this case." J.A. 67a. Levanowitz was also careful to point out that the Governor's Code of Conduct was not a "University policy," but rather, a "Commonwealth policy" which was not part of the University's policy per se with respect to labor relations. J.A. 65a-66a. With respect to his decision to suspend Homar, Levanowitz testified that he relied upon his previous experience, labor relations journals which he had in his possession, the Collective Bargaining Agreement and consultations with "labor relations people" in the "Chancellor's office." J.A. 65a-66a; Court of Appeals J.A. at 137.

Additionally, with respect to the Governor's Code of Conduct, it should be noted that Levanowitz and ESU did not abide by the very provisions that they now bring before the Court as a basis for their actions. Specifically, after all charges against Homar were dismissed on September 1, 1996, Levanowitz did not lift the suspension which Petitioners now argue was necessitated by the Governor's Code of Conduct – but rather continued with the same pending his own independent investigation. The regulation at issue clearly provides that a suspension is to be imposed on the basis of a felony arrest. If Levanowitz was basing his actions on the Governor's Code of Conduct and was bound by the same, then why was the suspension not lifted upon dismissal of all charges against Homar?

Finally, in any event, " 'the minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " *Loudermill*, 470 U.S. at 541, *citing Vitek v. Jones*, 445 U.S. 480, 491 (1980).

The Petitioners' eleventh hour reliance on the Governor's Code of Conduct should be rejected by this Court.

3. The second *Mathews* factor also requires an analysis of the probable value of any additional or substitute procedural safeguards. 424 U.S. at 335. Of course, with respect to Homar's suspension, no procedural safeguard was in place whatsoever. Rather, the suspension by Levanowitz was nearly automatic, after Levanowitz learned of Homar's arrest.

Notice to Homar and an opportunity to be heard would have afforded Homar the chance to plead his innocence of the charges to Levanowitz and argue against his suspension. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Even if one believes that Homar would have had little success in convincing Levanowitz not to suspend him, such an unfavorable outcome for the employee does not mitigate against the opportunity to be heard. The right to a hearing does not depend on a demonstration of certain success. *Loudermill*, 470 U.S. at 544, citing *Carey v. Piphus*, 435 U.S. 247 (1978). "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case, due process of law would have led to the same result because he had no adequate defense upon the merits' ". *Fuentes*, 407 U.S. at 87 citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

C. No Significant Fiscal Or Administrative Burden Would Be Imposed By Requiring Pre-Deprivation Notice And An Opportunity To Be Heard.

1. Homar agrees with the Court of Appeals that the governmental interest in maintaining public confidence in the ESU police force is significant. Pet. App. 11a.

However, notwithstanding that strong governmental interest, it is submitted that an additional requirement of a hearing before suspension without pay would impose to such a negligible degree on the governmental interest that, considering the analysis of all factors under *Mathews*, a pre-suspension opportunity to be heard is appropriate.

Here, a pre-deprivation opportunity is especially critical because the suspension was indefinite. The "potential length" as well as the severity of the deprivation must be examined in determining whether advance procedural safeguards are appropriate. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 19 (1978). Because the length of the suspension was open ended, Homar theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay. Under these circumstances, it is submitted that some procedural safeguard was appropriate prior to the deprivation.

In the case at bar, ESU would have suffered no detriment by permitting Homar the opportunity to be heard prior to his suspension. ESU could have expeditiously provided Homar with such an opportunity at virtually no cost.

Homar is not suggesting that he would be entitled to a full evidentiary hearing prior to his suspension. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). However, Homar believes he was entitled to notice of his suspension and an opportunity to be heard. It is submitted that Homar should be

entitled to at least as much pre-deprivation due process as is a high school student facing a ten-day suspension, that is, oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

Assuming arguendo that the significant State interest in law enforcement strongly argued in favor of an immediate suspension, there still remains the issue of whether such suspension should be with or without pay. The additional procedural safeguard of a pre-deprivation hearing would have given Homar the opportunity to request that his suspension be with pay. This is a unique aspect of an employment case which is not present in many of the due process cases relied upon by Petitioners and Petitioners' *amici* for the proposition that in some limited, emergency situations, summary action without a pre-deprivation opportunity to be heard is permissible. See *Hodel v. Virginia Surface Min. & Reclam. Assn.*, 552 U.S. 264 (1981) (order to cease strip mining); *Barry v. Barchi*, 443 U.S. 55 (1979) (suspension of horse training license); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of driver's license); *Ewing v. Mytinger and Casselbarry, Inc.*, 339 U.S. 594 (1950) (seizure of misbranded food supplement).

Despite the argument of Petitioners and their *amici* to the contrary, the cost of paying an employee's wages for the brief period of suspension will not deplete government coffers or erode the public fisc. Because the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during

the suspension minimal. See *Barry v. Barchi*, 443 U.S. at 66 (1979). Several days pay during a period of a suspension pending a *Loudermill* hearing is certainly not analogous to a "paid vacation," as is argued by Petitioners. Pet. Br. 22.

2. Petitioners and their *amici* strongly rely upon *Barry v. Barchi* and *FDIC v. Mallen*. It is submitted that neither of these cases requires a departure from the general rule that notice and opportunity to be heard should be provided prior to a deprivation.

In *Barchi*, a harness race horse trainer was suspended for a period of fifteen days by the New York State Racing and Wagering Board after a post-race urinalysis revealed a drug in Barchi's horse. 443 U.S. at 372. New York law presumes that such drugs were either administered by the trainer or resulted from his negligence in failing to adequately protect against such occurrence. *Id.* Barchi filed suit alleging, *inter alia*, that he was entitled to a full evidentiary hearing prior to the effectuation of his suspension. 443 U.S. at 64.

The Court held that New York State was entitled to impose an interim suspension pending a prompt judicial or administrative hearing. The Court held that the positive drug test "would appear sufficiently reliable to satisfy constitutional requirements" and establish the probable cause needed to justify a suspension pending a post-deprivation hearing. *Id.* However, the Court also noted that "although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging 16 days prior to the imposition of the suspension, and he was given more

than one opportunity to present his side of the story to the State's investigators. In fact, he stated his position in the course of taking two lie detector examinations." *Id.* at 65.

The Court then stated that "[e]ven if the state's pre-suspension procedures, then, were not adequate finally to resolve the issues fairly and accurately, they suffice for the purpose of probable cause and interim suspension." 443 U.S. at 66. *Barchi* was decided prior to *Loudermill*, and is cited by *Loudermill* as a case in which termination procedures were found to be constitutional based in part upon "the existence of some pre-termination opportunity to respond". 470 U.S. at 542.

Based upon the foregoing, *Barry v. Barchi* is not a case where "the Court approved pre-hearing suspensions," as argued by Petitioner. Pet. Br. 11. Rather, *Barchi* addresses the question of what quantum of due process is to be afforded after an application of the traditional *Mathews* balancing factors. Although *Barchi* maintained that he was entitled to a full evidentiary hearing, the Court found that Barchi was afforded "pre-suspension procedures," which the Court found constitutionally adequate under the circumstances. 443 U.S. 376. This interpretation of *Barchi* is validated by the manner in which *Barchi* is cited by this Court in *Loudermill*, 470 U.S. at 542.

In *FDIC v. Mallen*, the president of an Illinois bank was suspended after he was indicted for conspiracy to commit mail fraud. Under the Federal Deposit Insurance

Act, the FDIC was given authority by Congress to suspend and indict a bank officer without providing a pre-deprivation opportunity to be heard. 486 U.S. at 233.

Four days after his suspension, the bank president requested an administrative hearing as is provided for in the Act. 12 U.S.C. §1818(g). Although the bank president desired to offer oral testimony at the hearing, the FDIC took the position that oral testimony would not be necessary. Prior to the scheduled hearing, the bank president commenced suit in federal court. The District Court held that the post-suspension process violated due process because it did not provide for a prompt disposition and also because it failed to provide for a hearing at which oral evidence could be presented. 486 U.S. at 277. As the Court stated, "[i]t is the adequacy of the post-suspension procedure authorized by [12 U.S.C. § 1818(g)(3)] that is the issue in this appeal". 486 U.S. at 235.

After acknowledging that the bank president clearly had a property right protected by the Fifth Amendment Due Process clause, the Court specifically noted that "[a]ppellee does not contend that he was entitled to an opportunity to be heard prior to the order of suspension." *Id.* at 240. The Court, in *dicta*, then briefly discussed the narrow exception to the general rule that a notice and opportunity to be heard must be provided before a deprivation. *Id.* at 240-241. The Court discussed "postponing the opportunity to be heard" in the specific context of whether it was appropriate to provide the suspended bank president with "a separate pre-suspension *hearing*." *Id.* (emphasis added) In *dicta*, the Court found that the suspension "was not baseless" because a Grand Jury had independently determined that there was probable cause

to believe that the bank president had committed a felony, and that Congress had made findings that a prompt suspension is important to the integrity of banking institutions. *Id.* at 240.

Preliminarily, as the Court of Appeals notes, it is unclear in *Mallen* if the suspension was with or without pay. Pet. App. 12a. The legislation at issue does not specifically indicate whether the suspension is to be with or without pay. 12 U.S.C. § 1818(g)(3), as amended.

This case is distinguishable from *Mallen* for several reasons. First, and perhaps most importantly, the discussion found in *Mallen*, in *dicta*, appears to relate to whether a full evidentiary "hearing" should be afforded prior to the suspension. *Mallen*, in *dicta*, refers several times to *Barry v. Barchi*, and the conclusion in *Barchi* that the interest in the State in preserving the integrity of the sport of horse racing was "deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a *hearing*". 443 U.S. at 64-65 (emphasis added). As discussed above, some pre-suspension due process was afforded in *Barchi*. However, the primary issue in *Barchi* was whether the trainer was entitled to an evidentiary hearing prior to the suspension. This appears to be the same issue discussed in the *Mallen dicta*, as opposed to analysis of whether some less elaborate form of notice and an opportunity to be heard is appropriate.

Secondly, the indicia of "probable cause to believe that appellee had committed a felony" (486 U.S. at 278) is much less compelling in the present case. In *Mallen*, the

bank president was the subject of a grand jury indictment. Although a grand jury is an ex-parte proceeding, it nonetheless provides some protection against improper arrest and criminal prosecution that a spontaneous arrest incident to the execution of a search warrant does not provide.

Thirdly, determining the nature of the governmental interest, the Court considered specific Congressional findings and legislation in determining "that a prompt suspension is important to the integrity of our banking institutions." 486 U.S. at 241. In the case at bar, there are no similar legislative findings or statutes which the Court could consider in assessing the nature of the governmental interest involved.

For the above reasons, neither *Barchi* nor *Mallen* should preclude a finding that some pre-deprivation opportunity and a notice to be heard should have been afforded to Homar prior to his suspension without pay.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI, P.C.

JAMES V. FARERI, Esq.*

JENNIFER HARLACHER SIBUM, Esq.
712 Monroe Street
Stroudsburg, PA 18360
(717) 421-9090

**Counsel of Record*